JUN 16 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

NO. 72-1705

MARGARET CARINI,

Petitioner

vs.

ZONING BOARD OF APPEALS OF THE TOWN OF WEST HARTFORD

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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.07

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IN THE

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OCTOBER TERM 1973

No._____

MARGARET CARINI,

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vs.

ZONING BOARD OF APPEALS OF THE
TOWN OF WEST HARTFORD

Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF CONNECTICUT

The Petitioner, Margaret Carini, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Connecticut entered in this proceeding on December 7, 1972.

OPINION BELOW

On June 25, 1969, the defendant Zoning Board of Appeals conducted a public hearing to consider the application of the Petitioner, Margaret Carini, for a variance to continue to use the premises known as 743 Prospect Avenue as a rooming house. At an executive session of the Board, held immediately following the public

hearing, the application (petition) was denied. The Petitioner thereafter appealed the board's decision to the Court of Common Pleas for Hartford County. That court dismissed the appeal. From that dismissal, the Petitioner appealed to the Supreme Court of Connecticut, which found no error in the proceedings below. Opinion of the Supreme Court and the Court of Common Pleas in the Appendix.

JURISDICTION

The opinion of the Supreme Court of Connecticut was entered on December 26, 1972. A timely Motion for Permission to Reargue was denied on January 18, 1973. On March 13, 1973, the Petitioner was granted an extension of time from the United States Supreme Court within which to file its Petition for a Writ of Certiorari to and including June 17, 1973. A stay of judgment was granted by the Supreme Court of Connecticut on March 16, 1973 until disposition by the United States Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Zoning Board of Appeals denied the Petitioner the equal protection of laws guaranteed by the Fourteenth Amendment by denying her a rooming house license while granting similar licenses to others similarly located where the only difference was that Petitioner's roomers are retarded persons.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment.

STATUTORY PROVISIONS INVOLVED

The ordinances involved are Connecticut General Statutes Section 8-b(3) (Rev. 1958) and Section 17.5.5(c) (App. 9-A) of the Zoning Ordinances of the Town of West Hartford adopted July 23, 1968, effective September 9, 1968.

STATEMENT OF THE CASE

The Petitioner, Margaret Carini, is the owner of the premises known as 743 Prospect Avenue, West Hartford. The main building thereon is an old 18-room house with 7 bathrooms, 2 large foyers and 4 porches. On the first floor there are 3 living rooms, a kitchen and 2 bathrooms; on the second, 4 bedrooms; on the third, 4 bedrooms and a sitting room and in the basement a dining room, a kitchen and a laundry. In addition, there is provision for parking of 15 cars.

At the time of the application and for 28 years prior thereto, the premises were used as a rooming house.

The Petitioner purchased the premises in 1966 for use as a rooming house and early in 1967 introduced into it as roomers persons from Mansfield Training School. The roomers are men suffering from mental retardation of varying degrees but who the State of Connecticut feels would benefit from a home rather than an institutional environment. At the time of the appli-

cation there were living on the premises 15 such roomers and a housekeeper and her children. The rooming house is licensed under the rooming house ordinances of West Hartford by its building inspector.

Shortly after the introduction of the retarded roomers, the building inspector, in July, 1967, revoked the rooming house license. His action was appealed to the Court of Common Pleas for Hartford County. In its memorandum of decision that court recommended, as the proper remedy for redress of the revocation, that the Petitioner seek a variance. The basis of that decision was that rooming houses were never a legal use since the inception of West Hartford zoning in 1924, and acts of the agent building inspector in granting licenses since 1949 were not sufficient to bind the town. The Petitioner followed the court's guidance and sought a variance which was denied by the Zoning Board of Appeals. The denial was arbitrary and unreasonable in that the general area in which the subject premises are located is zoned R-10 (single-family), but the area is hardly residential in character.

Of 32 parcels fronting on Prospect Avenue, 15 are used for other than single-family purposes and these 15, on a front footage basis, represent a much greater proportion of non-single family than single-family use. The next abutting West Hartford Street, Highland Street, reflects substantially the same situation.

Clearly the age of the house, its size and physical layout militate against its use as a single-family residence. Indeed, as early as

1941, the town recognized this fact when it allowed the present use to come into existence. Petitioner has alleged that to return it now to its pre-1941 use would be a great hardship.

Appeal to the State Supreme Court, while based on review of alleged error by Court of Common Pleas in holding that the Board did not act arbitrarily and unreasonably in denying the variance, raised additional questions regarding unreasonable action by the Board in light of a reversal of the town's rooming house policy in John P. Sullivan et al v. West Hartford Building Inspector (Court of Common Pleas, Hartford County, No. 105312 29 C. S. 439). The State Supreme Court refused to consider facts in the record which showed that the latest basis for denying Petitioner the license while granting it to others was solely that of discrimination against the retarded persons Petitioner accepted as roomers.

REASONS FOR GRANTING THE WRIT
ARGUMENT

The Zoning Board of Appeals denied the Petitioner the equal protection of laws guaranteed by the Fourteenth Amendment by denying her a rooming house license while granting similar licenses to others similarly located, where the only difference was that Petitioner's roomers are retarded persons.

Connecticut Ceneral Statutes, Sec. 8-6(3) (Rev. 1958) and Section 17.5.5(c) (App. 9-A) of the Town of West Hartford, adopted 7-23-68, effective 9-9-68, use the same language investing the Zoning Board of Appeals with authority to vary the application of the Zoning Ordinances.

The ordinary reason for a request for a variance is to change something in some way and the concern of a zoning ordinance is to protect the area surrounding the subject of the request from an unreasonable burden. Here, however, nothing was sought to be changed or enlarged. The neighborhood has had 28 years to adjust to the present use of the subject premises. Because of the history of this use and other uses in the area, "....a literal enforcement of this Ordinance would result in exceptional difficulty or unusual hardship."

The Petitioner did nothing subsequent to her acquisition of the subject premises to require the requested variance. Importantly, her request is not to better her financial position. Rather, having purchased in good faith a use with a 25-year history and having taken no positive action to alter the use, she seeks only to continue it. Only because of the revocation of the license and on the advice of the Court of Common Pleas did she seek the variance which apparently is now essential if she is to continue the long-established use of the subject premises.

The zoning board "is created to keep the law running on an evel Keel" by varying within prescribed limits and consonant with the exercise of legal discretion, the strict letter of the zoning law, in cases of claims having real merit which can be granted consistently with the spirit and purposes of the general plan." St. Patrick's Church Corporation v. Daniel, 113 Conn. 132, 139 (1931). Stavola v. Buckley, 134 Conn. 186, 190 (1947).

This case is somewhat one of first instance because of the hybrid legal status of the property in question. It does not fall under the ordinary definition of a "non-conforming" use for its use came into existence subsequent to zoning. It is not an illegal use as the trial court stated becuase it was allowed to exist under town license authorized by ordinances. The variance was not sought because of a change, after acquisition, in the neighborhood, nor was it sought to allow a change in the physical nature or use of the building. In fact, the Petitioner didn't even want a variance until the town attempted constructively to confiscate the long established use of her property as a licensed rooming house.

Under the circumstances then, the action of the board would appear patently arbitrary because it resulted in a constructive confiscation of a valuable right.

Until recently, the task of adequately demonstrating the inference of arbitrariness was substantial. The Town of West Hartford lightened this burden in the case of John P. Sullivan et al v. West Hartford Building Inspector (Court of Common Pleas, Hartford County No. 104312 29 C.S. 439). That case involved property immediately to the south of the subject property. It too had been used as a rooming house for a long period of time. Neighbors sought a writ of mandamus to compel the building inspector to revoke its rooming house license. The building inspector felt that he should not deny the license and accepted the advice of the Town's corporation counsel.

If what the town really wishes to do is to eliminate from its borders older retardates because it deems them undesirable, then it should state so unquestionably and without resort to indirection. It should not be allowed under the guise of zoning to engage in invidious discrimination. Clearly the town does not feel that rooming houses are improper per se for it currently permits no less than three in the immediate neighborhood.

CONCLUSION

The conclusion then that the board's reason for denying the variance was to insure that the citizens of West Hartford be spared the presence in their midst of the harmless unfortunates who reside at the Petitioner's property is difficult to escape. Apparently through the vehicle of the zoning ordinances did the board hope to relegate to an institution or at least to some other town those whom it would not have as residents of West Hartford.

The Zoning Board of Appeals' action was unreasonable and based solely on discrimination violative of the equal protection clause of the Fourteenth Amendment.

Respectfully submitted,

Bruce Mayor
190 Trumbull Street
Hartford, CT 06103

Attorney for Petitioner

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APPENDIX

A - 1

OPINION OF THE SUPREME COURT OF THE
STATE OF CONNECTICUT

MARGARET CARINI V. ZONING BOARD OF APPEALS OF
THE TOWN OF WEST HARTFORD

Appeal from the denial of a variance to permit the use of premises as a rooming house, brought to the Court of Common Pleas in Hartford County and tried to the court, Hamill, J.; judgment dismissing the appeal, from which the Plaintiff appealed to this court. NO ERROR.

PHILIP R. DUNN, for the appellant (plaintiff).

FANNIE HIMMELSTEIN, assistant corporation counsel for the appellee (defendant).

LOISELLE, J. The zoning board of appeals of the town of West Hartford denied the plaintiff's application for a variance to permit the continued use of her premises as a rooming house for at least fifteen persons. The plaintiff appealed to the Court of Common Pleas which rendered judgment dismissing the appeal and from that judgment the present appeal was taken.

The undisputed facts presented at the hearing relevant to this appeal establish that the plaintiff owns a large eighteen-room dwelling located at 743 Prospect Avenue, West Hartford, with seven bathrooms, two large foyers and four porches. The premises have been used as a rooming house since about 1941, and were licensed as a rooming house by the building inspector for West Hartford from 1949 until some time before July 26, 1967.

The Plaintiff purchased the premises in 1966 for use as a rooming house and thereafter accepted as roomers persons from the Mansfield Training School. Although these persons were in varying degrees mentally retarded, the state of Connecticut felt they would benefit from a homelike atmosphere rather than an institutional environment.

On June 5, 1969, the plaintiff made an application to the defendant zoning board of appeals for a variance "for use as a rooming house as presently used." The plaintiff asserted that a previous application had been filed in connection with the premises on July 26, 1967, and that in the present application hardship was claimed on the ground that "multiple room house is such that rooming house is only reasonable and practical use. House has history as rooming house since 1941." The zoning board of appeals denied the application but offered no reason for its decision. This court has many times declared that a zoning board of appeals should state reasons for its actions because the failure to state reasons casts on the court the burden of searching the record in an attempt to find some basis for the action taken. Ward v. Zoning Board of Appeals, 153 Conn. 141, 144 215 A.2d 104; Zieky v. Town Plan & Zoning Commission, 151 Conn. 265, 268, 196 A.2d, 758. While it is recognized that public-spirited citizens volunteer to perform their civic duties in serving on boards such as those involving zoning, the responsibility accompanying these positions includes the duty to act in accordance with the law, to insure the preservation of the rights of those affected.

The plaintiff assigns as error the court's conclusion that the zoning board of appeals did not act illegally, arbitrarily or unreasonably or in abuse of its discretion in denying the plaintiff's application for a variance of the zoning ordinances to permit continued use of the premises as a rooming house.

The application claims hardship. and, at the hearing before the board, counsel for the plaintiff stated that hardship existed in that the premises, because of the structural arrangement and number of rooms, could not be used except as a rooming house. Nowhere in the record, however, other than the description of the physical characterisitcs of the building, is there any supporting evidence of "unusual hardship." The plaintiff has not demonstrated in the record that the hardship occasioned by enforcement of the zoning ordinance is any different in kind from that generally affecting properties in the same zoning district. Garibaldi v. Zoning Board of Appeals, 163 Conn. (33 Conn. L. J. No. 52, pp. 1,2); Belknap v Zoning Board of Appeals, 155 Conn. 380, 383, 232 A.2d 922; Ward v. Zoning Board of Appeals, supra, 143. The plaintiff's unsupported claim that the only practical and reasonable use appropriate for her premises is as a rooming house is inadequate to establish hardship peculiarly oppressive to her property. Makar v. Zoning Board of Appeals, 150 Conn. 391, 190 A.2d 45. Furthermore, no showing has been made of a financial loss to the plaintiff so great as practically to destroy or greatly to decrease the value of the plaintiff's premises for any permitted use. Libby v. Board of Zoning Appeals, 140 Conn. 46, 118 A.2d 894.

The plaintiff narrowed her argument in her brief to the assertion that because the premises had been operated as a rooming house for twenty-eight years, which included twenty years under a rooming house license from the town of West Hartford, it was patently arbitrary for the zoning board to refuse to issue a variance allowing continued use of the premises as a rooming house. The plaintiff further claimed that the denial of a variance under these circumstances resulted in a "constructive confiscation of a valuable right."

It is admitted by the plaintiff that her premises do not qualify as a nonconforming use since the operation of the rooming house began subsequent to the enactment of the zoning ordinances.

The thrust of the plaintiff's argument is that since zoning officials failed to enforce the ordinance over a long period of time it would now be arbitrary for the zoning board of appeals to refuse to grant a variance to protect the plaintiff from enforcement of the ordinance. It is not the function of a zoning board of appeals to consider matters such as estoppel or laches in determining whether a variance should be granted. The board's power is restricted to that provided by the zoning ordinance in accordance with legislative or statutory enactments. Langer v. Planning & Zoning Commission, 164 Conn. (34 Conn. L.J., No. 7, p.3); Avonside, Inc. v. Zoning & Planning Commission, 153 Conn. 232, 236, 215 A2d 409; Eden v. Town Plan & Zoning Commission, 139 Conn. 59, 63, 89 A.2d 746; Wallingford v. Roberts, 145 Conn. 682, 685, 146 A.2d 588.

A municipality cannot be prevented from enforcing its zoning regulations by the unauthorized acts of its officers or agents in matters involving a governmental function. Bianco v. Darien, 157 Conn. 548, 556, 254 A.2d 898; Hebb v. Zoning Board of Appeals, 150 Conn. 539, 542, 192 A.2d 206. The plaintiff relies heavily in her brief on the fact that in a pending mandamus action the building inspector of West Hartford is resisting the efforts of the plaintiff's neighbors to force revocation of the license of a rooming house adjacent to the plaintiff's premises. The factual circumstances on which this decision of the building inspector is based are unknown, but, in any event, failure to comply with zoning ordinances cannot be justified by the existence of other violations unless it is shown that a pattern of discrimination has been consciously practiced by the municipality. Bianco v. Darien, supra; 16 Am. Jur. 2d, Constitutional Law, §541; 1 Yokley, Zoning Law and Practice (3d Ed.) §10-8, p. 447. The building inspector's refusal to revoke a rooming house license in one instance on advice of the corporation counsel falls short of demonstrating a discriminatory purpose. Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L. Ed. 497.

In her brief, the plaintiff intimates that the town of West Hartford engaged in discrimination against elder retardates under the guise of zoning. No such discrimination is revealed in either the transcript or the entire record. The plaintiff's claim of arbitrariness on the part of the zoning board of appeals cannot be usstained.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

OPINION OF THE COURT OF COMMON PLEAS

This is an appeal from the action of the defendant Board in refusing to grant a request for a variance concerning premises located at No. 743 Prospect Avenue, West Hartford for use as a rooming house as presently used.

The plaintiff is the owner of said premises and is found to be an aggrieved person. The plaintiff or her predecessors has been operating said premises under a rooming house license since about 1941. The building is an old eighteen-room house with seven bathrooms, two large foyers and four porches. In addition to the kitchen, living rooms and dining rooms, there are ten bedrooms. The plaintiff does not live on the premises but has a housekeeper to manage the occupants who are retarded mentally and are from the Manfield Training School. The state pays for their maintenance. At the time of plaintiff's application there were thirteen such roomers.

Zoning regulations in effect since 1924 have made no provision for a rooming house in an R-6 residential district, other than as an accessory use limited to three or less persons in addition to the family residing in the dwelling. Accordingly, the plaintiff even though she has had a rooming house license, has been operating such, not as a non-conforming use, but as in illegal use.

The thrust of the present application is to obtain permission to increase the number of legal roomers to thirteen or fifteen from the permitted three.

Plaintiff's claim is based upon the fact that the character of the neighborhood is changed and that there was no opposition to the premises being used as a rooming house until occupancy by the present retardates. There is no evidence offered as to whether the other rooming houses are illegal, as is the plaintiff's or on the other hand are non-conforming or have had variances granted similar to what is sought here.

Although in the instant case the defendant Board gave no reason for its action, a search of the record fails to reveal exceptional difficulty or unusual hardship.

Plaintiff's application is for a variance for use as a rooming house as presently used. Actually, the use being made is not that of the usual rooming house, but as a use more in the nature of an out-patient institution.

Disadvantages in property value, or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of practical difficulty or unusual hardship.

Because of the proximity of local boards to local circumstances and conditions, their decisions should be overruled only when it is found that they have not acted fairly, with proper motives and upon valid reasons. Such is not found here.

If the plaintiff sought her variance upon a changed character of the neighborhood, the evidence as to this should have been thorough and exhaustive. Upon the record, the court to reverse the Board on this ground would have to resort to much speculation and conjecture. Since the court cannot substitute its judgment for the wide discretion of the defendant Board, the appeal is dismissed.

Hamill, J.

Filed May 4, 1971.

APPENDIX C

TRANSCRIPT OF PUBLIC HEARING: July 1, 1969

MR. COOPER: The petitioner, Mrs. Carini, has just arrived.

Now--this building is a residence building. It was originally presumably used as a one family residence. This is a residence zone, but we would like first of all to call to the attention of the Board that the house is a huge home--that structurally it contains 18 rooms, 7 bathrooms, two huge foyers and 4 porches. There are three living rooms on the first floor, kitchen, and two bedrooms; on the second floor there are four bedrooms; on the third floor there are four bedrooms and a sitting room; and in the basement there is a dining room, a kitchen and a laundry.

Now, basically, of course, we appreciate that this Board can only grant a variance where there are special conditions attached to the property. What we present to this Board here tonight is a simple claim that because of the structural arrangement of this building and because of the number of rooms in it, as we have described, there really isn't any practical use to which the building can be put other than as a rooming house. We ask the Board to consider this as our basic claim of the special condition, which should entitle us to a variance, and we also ask the Board to consider this in the light of the long history of the use of these premises as a rooming house. This use goes way back to 1941. The licensing of the building as a rooming house goes way back to 1949. The buiding is now occupied by 15 roomers,

plus a housekeeper. Is that correct, Mrs. Carini, 15 roomers plus a housekeeper?

This is a multiple r-om house and it is quite obvious, I should think, it would be obvious that it's use for other purposes would be quite severely limited.

The second point that we would like to bring to the attention of this Board is the surrounding area. Of course, this Board cannot grant a variance unless the Board finds that the use for which a variance is sought does not materially affect the property values or the public health and welfare of the surrounding area. We would like to call to the attention of the Board just what this surrounding area is. I am sure the Board must be familiar with the area, but we have prepared a small sketch, with several copies, which we would like to file with the Board, if we may, to show the present uses to which the buildings in this area are being put at the present time and for a number of years.

MR. HAYES: Counssellor, may I interrupt you for a moment to identify this. Would you explain to the Board and for the record, who it was that prepared this particular map.

MR. COOPER: This map was prepared by a Mr. Roland Froncoer. Can you identify Mr. Froncoer, Mrs. Carini?

MRS. CARINI: He, I believe, is an engineer, as far as I know.

MR. HAYES: Do you have any idea on the basis--

MR. COOPER: Mr. Froncoer made a tour of the area, and identified the uses which are indicated on this map.

MR. HAYES: Well, we'll have this entered into the records, marked Exhibit D-D or C-C.

MR. COOPER: Mr. Globman here has made an analysis of this map with respect to its uses and perhaps he can make a statement at the present time.

MR. GLOBMAN: Yes, for the record, I would like to point out that excluding what is deemed to be illegal uses of this area, and we are now limiting ourselves strictly to the west side of Prospect Avenue., in the block bordered by Farmington Ave. and Ferm Street, we find that giving due consideration to the fact that the buildings which are listed on this map as rooming houses, for thispurpose, deem them to be single family residences, and even using this an a fact, we find that single family residences have frontage on this street of 884.03 feet, whereas other uses, such as apartments, office buildings, schools, etc., has 940 feet, which would give a majority of the so-called legal uses of the frontages of this area being preponderently in favor of other than single family.

Now, considering the actual use, and taking note of the fact that two of these lots are being used as rooming houses--

MR. HAYES: I suspect they have been visited by the same letter than has been received by other rooming houses.

MR. GLOBMAN: Probably, but giving consideration to that fact, you will find that uses other than residences take up 1146.03 feet of frontage, as opposed to 678 feet of frontage for single family residences, and this is the character of this block as it presently is. If you will look at the block just to the rear of the Prospect-Highland you will find that this is quite similar, as presented for the Prospect Ave. situation.

MR. HAYES: What you have apparently related on this exhibit is there is a certain substantial amount of land usage made by the Oxford School, land usage by the Robinson School, etc., and I think your statistic was very carefully drawn to include within your comparison to take only single family residences or other uses.

APPENDIX D

AN ORDINANCE CONCERNING THE LICENSING OF ROOMING HOUSES, May 24, 1949

Be it ordained by the Town Council of the Town of West Hartford:

SEC. 1 PURPOSE:
The purpose of this ordinance is to further and better protect the interests of the community in respect to the safety of rooming houses in regard to fire, health and building structure.

SEC. 2. DEFINITION:
For the purpose of this ordinance a "rooming house" is a house or buiding containing bedroom space for four or more persons, not members of the family of the proprietor, which bedroom space the proprietor can sapre for the purpose of giving lodgings to such persons as he chooses to receive. An apartment house, hotel, hospital, convalescent home or private school shall not be considered a "rooming house" within the meaning of this ordinance.

SEC. 3. LICENSE REQUIRED:
On or about November 1, 1949, no person, firm or corporation shall conduct, operate or maintain a rooming house in the Town of West Hartford unless he has obtained a license therefor as hereinafter provided.

SEC. 4. Any person, firm or corporation desiring to conduct, operate or maintain a rooming house shall submit to the Building Inspector of the town, an application for a license, on a form

provided by said Building Inspector, and shall furnish therewith such information as the Building Inspector may deem advisable in connection with said application.

SEC. 5. Upon the filing of such application (a) the Chief of the Fire Department of the Town shall forthwith examine said premises for the purpose of determining its suitability for such occupancy in respect to fire and safety laws and regulations of the State and the town. He shall make a written report of his approval or disapproval of said application to the Building Inspector. In the event of disapproval, he shall set forth in said report the repairs, alterations or limit in the number of occupants necessary to meet the requirements of said fire regulations, or shall report that in his opinion said building cannot be repaired or altered to conform to such requirements; (b) the Director of the Department of Health shall forthwith examine said premises for the purpose of determining its suitability for such occupancy in respect to the health and sanitation laws and regulations of the State and the town. He shall make written report of his approval or disapproval of said application to the Building Inspector. In the event of disapproval, he shall set forth in said report the repairs, alterations or limit in the number of occupants necessary to meet the requirements of said health and sanitation regulations, or shall report that in his opinion said building cannot be repaired or altered to conform to such requirements; (c) the Building Inspector shall forthwith examine said premises for the purpose of determining its suitability for such occupancy in respect

to the building code and building regulations of the State and the town. He shall file in the office of the Building Inspector his written report of his approval or disapproval of said application. In the event of disapproval, he shall set forth in said report the repairs or alterations or limit in the number of occupants necessary to meet the requirements of said building code and regulations, or shall report that in his opinion said building cannot be repaired or altered to conform to such requirements.

APPENDIX E

ZONING ORDINANCES OF THE TOWN OF WEST HARTFORD
ADOPTED July 23, 1968 EFFECTIVE September 9, 1968

17.5.50 ZONING BOARD OF APPEALS

17.5.51 POWERS AND DUTIES

The Zoning Board of Appeals shall have the following powers and duties.

a. To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by any official charged with the enforcement and administration of the Zoning Ordinance.

b. To hear and decide all matters, including special exceptions upon which it is authorized to pass by the specific terms of Sec. 17.5.53.

c. To determine and vary the application of the Zoning Ordinance in harmony with the general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of this ordinance would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured.

17.5.52 VARIANCES

a. No variance in the strict application of any of the requirements of the Zoning Ordinance shall be granted unless the Zoning Board of Appeals shall find:

1. That there are conditions especially affecting the land or structure for which the variance is sought, which conditions are peculiar to such land or structure and not to the personal or financial circumstances of the appellant and which conditions are not affecting generally the area in which such land or structure is situated and have not resulted from any act of the appellant subsequent to the enactment of the requirement appealed from. Minor infractions in the location or height of a structure or the dimension of area of a lot, caused by human error, may be considered sufficient cause for an affirmative finding of this paragraph, unless, in the opinion of the Zoning Board of Appeals, such infractions can be repaired without impairing the use of the land or structure.

2. That the aforesaid conditions are such that the strict application of the requirements of the Zoning Ordinance would deprive the appellant of the reasonable use of such land or structure and the granting of the variance is necessary for the reasonable use of the land or structure, and that the variance, as granted by the Board, is the minimum variance that will accomplish this purpose.

3. That the granting of the variance would not permit the property to be used for a purpose that is denied to the occupants of other properties in the same zoning district.

4. That the granting of the variance is in harmony with the general purpose and intent of the Zoning Ordinance and will not be detrimental to public health, safety, convenience, welfare and property values.

b. The records of the Zoning Board of Appeals shall include specific reasons for each of the findings above to be made before a variance may be granted. The Zoning Board of Appeals shall attach such conditions and safeguards as are necessary to insure continued compliance with the terms of the variance.

FILED
JUL 13 1973
MICHAEL RODAK, JR.

SUPREME COURT PRACTICE BRIEF IN OPPOSITION TO CERTIORARI

NO. 72-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

MARGARET CARINI

Petitioner

vs.

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Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT IN OPPOSITION

.....

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(DATE)

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CITATIONS

Margaret Carini v. Zoning Board of Appeals, Town of West Hartford, Supreme Court, State of Connecticut [October Term, 1972], XXIV CLJ 26.

Welch v. Swasey, 214 U.S. 91.

Zahn v. Board of Public Works of Los Angeles, 274 U.S. 325.

IN THE

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OCTOBER TERM, 1973

NO. 72-1705

MARGARET CARINI

vs.

TOWN OF WEST HARTFORD

On a Petition for a Writ of Certiorari to the Supreme Court of the United States

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Hamill, J., Court of Common Pleas, Hartford County, State of Connecticut, found that the Plaintiff (Appellant) was an aggrieved person, and found further: "Because of the proximity of local boards to local circumstances and conditions, their decisions should be overruled only when it is found that they have not acted fairly, with proper motives and upon valid reasons. Such is not found here." (May 4, 1971)

The Supreme Court, State of Connecticut (October Term, 1972) XXIV CLJ 26 held: "The plaintiff's (Appellant's) claim of arbitrariness on the part of the zoning board of appeals cannot be sustained".

JURISDICTION

The claimed jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

A. Whether the Zoning Board of Appeals acted illegally, or unreasonably or abused its discretion in denying the application of the plaintiff for a variance of the respondent's zoning ordinance to permit continued use of said premises as a rooming house.

B. Whether the Zoning Board of Appeals denied the Petitioner the equal protection of laws guaranteed by the Fourteenth Amendment by denying her a rooming house license.

STATEMENT

The petitioner is the owner of premises located at 739 Prospect Avenue in West Hartford, Connecticut, which consist of a residence and a garage in the rear yard. The main house is a three-story building containing eighteen rooms, of which there are two bedrooms on the first floor, four bedrooms on the second floor and four bedrooms on the third floor. The garage in the rear contains an oil burner and an oil tank on the first floor and three rooms on the second story. Said premises are in an R-10 residential zone.

The petitioner purchased the premises in 1966 at which time, the zoning regulations of the respondent were and still are in effect and a matter of public record.

In 1967 the Petitioner brought an action appealing from the revocation of her rooming house license to the Court of Common Pleas for Hartford County, State of Connecticut, which appeal was denied. The basis of that decision was that it was an improper method of procedure and therefore, the petitioner could not prevail. In its memorandum of decision, the Court went further and suggested correct steps that could be taken by the petitioner.

In the matter of *John P. Sullivan et al v. West Hartford Building Inspector* (Court of Common Pleas, in and for the

County of Hartford, #105312, 29CS 439), the Court held that mandamus does not lie in the situation presented and the relief sought was denied.

On June 5, 1969 the plaintiff filed an application with the Zoning Board of Appeals of the Town of West Hartford requesting a variance to permit the conduct of a rooming house on these premises. After a full hearing on June 25, 1969 said application was denied.

At the time of the hearing before the West Hartford Zoning Board of Appeals, these premises were used as a residence for fourteen retardates in the main building and four roomers in the rooms above the garage, in addition to a paid housekeeper and a male board. The record is not clear as to whether those occupying the garage area were retardates or not.

The plaintiff filed an appeal in the Court of Common Pleas in Hartford County, which appeal was denied. This decision was appealed to the Supreme Court of Errors of the State of Connecticut which upheld the lower court's decision.

ARGUMENT

The issue in the present case is uniquely narrow and no amount of strained semantics can convert it into one warranting review by this Court on certiorari. We are here concerned only with the jurisdiction of a zoning authority of a governmental agency in exercising its police power for the general plan of the community and must be in accordance with a comprehensive plan. The area in which the premises involved are located contains many homes of similar size occupied by private families. The petitioner refers to other rooming houses operating with a license. This is not a matter of record in either the original action or in the appeal to the Supreme Court of the State of Connecticut. The premises involved in the case of *John P. Sullivan et al v.*

West Hartford Building Inspector are being operated without a license. Respondent has taken no action respecting same for the reason that it is waiting a final determination in the instant case. It has been delayed from enforcing its zoning ordinances by the successive appeals which have been filed in this matter. The respondent further points out to this Court that no rooming houses licenses have been issued by the respondent in residence R-10 zones or any other residence zones since 1967. Petitioner's claim of discrimination in the instant case has no basis. The respondent has no prejudice as to retardates. In fact the writer of this brief is familiar with the program providing for housing for retardates outside of an institution and is highly in favor of it. She has participated in a small way and has had personal contacts with other retardates in the same situation. This is an outstanding program, but only when it is properly administered and properly supervised, does it function in the interests of the retardates who are allowed to participate in it.

The respondent does not concede, and in fact contests, the validity of the petitioner's claim that she has been denied equal protection of laws guaranteed by the Fourteenth Amendment. Her position is in no way different from that of other owners of large homes. On the facts and the law involved the decision of the Supreme Court of the State of Connecticut was manifestly correct and no other result could have been reached. Manifestly, there is no important correction of federal law requiring decision by this Court. In 274 US 325 the Court held that where the question whether the determination of a city council that a certain district of the city shall be included in a particular classification of a comprehensive zoning plan was unreasonable, arbitrary, or unequal exercise of power is fairly debatable, the court will not substitute its judgment for that of the legislative body, and the conclusion of the latter will not be disturbed. *Zahn v. Board of Public Works of Los Angeles, Ohio ex rel. Clarke v. Deckebach,* 274 US 392.

Zoning regulations in effect in the Town of West Hartford since 1924 have made no provision for a rooming house in an R-10 residential district, other than an accessory use limited to three or less persons in addition to the family residing in the dwelling. Accordingly, even though the plaintiff has had a rooming house license, she has been operating same, not as a non-conforming use, but as an illegal use, and petitioner admits this is a fact in her brief filed with her appeal to the Supreme Court of Connecticut (III Argument page 3).

Plaintiff's application is for a variance for use as a rooming house as presently used. Actually, the use being made is not that of the usual rooming house, but as a use more in the nature of an out-patient institution.

I. THE DECISION BELOW IS CLEARLY CORRECT

After a searching examination and analysis of the situation based on existing laws and previous decisions, the Court concluded that the denial by the Zoning Board of Appeals of the Respondent was clearly correct. It should be noted that the petitioner's arguments as to respondent's claimed prejudice against retardates and the court's decision in the matter of *John P. Sullivan et al v. West Hartford Building Inspector, supra,* citations were brought to the attention of the Court. These were no doubt considered by the Court and were dismissed. In the matter of *John P. Sullivan et al v. West Hartford Building Inspector, supra,* the Court did not rule on the question of the authority of the building inspector, or the subject of zoning, but, in fact, held that the action seeking a mandamus was an improper method of procedure and dismissed the complaint.

II. THERE IS NO CONFLICT OF DECISION

Petitioner asserts that the decision of the Court in the case of *John P. Sullivan et al v. West Hartford Building*

Inspector has changed the law and further claims that the advice of the Town's Corporation Counsel should prevail. It is a well established principal of law that a decision of a lower court cannot overrule the existing law as established by the Supreme Court of the State. It is obviously absurd that a statement by a Town Corporation Counsel can accomplish such an end. There is no conflict in the numerous decisions of the Supreme Court of Errors of the State of Connecticut.

Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 US 116, held: "Zoning ordinances must find their justification in the police power exerted in the interest of the public....

"The Court cannot say as a matter of law that the end in view in the passage of a zoning ordinance was not sufficient to justify the exclusion of all industries from sections set apart for residence, although some industries of an innocent character may fall within the proscribed class". Held: "That industrial development will be diverted from its natural course by a zoning ordinance, to another course whereby injury to the residential public will be obviated, is not alone sufficient to render a zoning ordinance unconstitutional.

"When a zoning ordinance is attacked upon the broad ground that its mere existence, by materially and adversely affecting values and curtailing opportunities of the market, constitutes a present and irreparable injury, the court will not scrutinize its provisions sentence by sentence to ascertain by process of piecemeal dissection whether there may be here and there provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality."

The great majority of cases in similar situations have upheld decisions of zoning authorities, as it did in this particular instance. The Supreme Court of the State of Con-

necticut held that: "A municipality cannot be prevented from enforcing its zoning regulations.

III. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner claims that she has been denied the equal protection of laws guaranteed by the Fourteenth Amendment. However, there is no citation or facts to establish her contention.

Conversely, the Courts have held to the contrary. *Washington ex rel. Seattle Title Trust Co.*, Roberge, 278 US 116.

Euclid v. Amber Realty Co., 272 US 365

Aunt Hack Pidge Estates Inc. v. Planning Commission, 160 Conn. 109, at 114 and 117. In *Carini v. Zoning Board of Appeals of the Town of West Hartford*, supra, the court said: The Plaintiff has not demonstrated in the record that the hardship occasioned by enforcement of the zoning ordinance is any different in kind from the generally affecting properties in the same zoning district. *Garibaldi v. Zoning Board of Appeals*, 163 Conn. (33 Conn. L.J., No. 52, pp. 1,2); *Belknap v. Zoning Board of Appeals*, 155 Conn. 380, 383, 232 A.2d 922; *Ward v. Zoning Board of Appeals*, supra, 143.

The discrimination or classification made between the commercial and residential sections of Boston, by Mass. Pub. Acts 1904, chap. 333, and Acts 1905, chap. 383, limiting the maximum height of buildings in the commercial district to 125 feet, and the residential districts to from 80 to 100 feet, will not, in the face of a decision of the highest state court, upholding such legislation as passed in the exercise of the police power, be held so unreasonable as to deprive the owner of property in the residential section of its profitable use without justification, and hence to take his property without due process of law unless compensation be given him for such invasion of his rights, even though esthetic considerations may have entered into the reasons for the

passage of such enactments. *Welch v. Swasey,* 214 U.S. 91, 29 S.Ct. 567.

A comprehensive zoning ordinance regulating the character of buildings which lawfully may be erected in designated districts is not repugnant to the due process of law and equal protection clauses of the Fourteenth Amendment to the Federal Constitution in its operation against one denied a permit to erect a business building in a district restricted to residential purposes. *Zahn v. Board of Public Works of Los Angeles,* 274 U.S. 325, 47 S.Ct. 594.

In Petitioner's Brief filed in the Supreme Court, State of Connecticut, she admits that she has been operating the rooming house, not as a non-conforming use, but as an illegal use. (III ARGUMENT Page 3)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

FANNIE HIMMELSTEIN,
Counsel for Respondent

Dated: July 12, 1973

FILE COPY

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

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MARGARET CARINI,

Petitioner

vs.

ZONING BOARD OF APPEALS OF THE TOWN OF WEST HARTFORD

Respondent

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Bruce Mayor
190 Trumbull Street
Hartford, Connecticut 06103
Counsel for Petitioner

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner moves for leave to file the attached petition for a rehearing of this Court's order dated October 9, 1973, denying the petition for a writ of certiorari to the Supreme Court of the State of Connecticut. This motion is made because counsel for petitioner was under the mistaken impression that the office of the Clerk of the Supreme Court was not open on Saturday and that the 25th day of the period would thus fall on Monday, November 5, 1973. Copies of the petition were mailed from Hartford on Friday, November 2, 1973 in what counsel for Petitioner thought was a timely manner.

Bruce Mayor
Counsel for Petitioner

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SUPREME COURT, U.S.

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vs.

ZONING BOARD OF APPEALS OF THE TOWN OF WEST HARTFORD

Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Bruce Mayor
190 Trumbull Street
Hartford, Connecticut 06103
Counsel for Petitioner

PETITION FOR REHEARING

Petitioner presents her petition for a rehearing of this Court's order dated October 9, 1973, denying the petition for a writ of certiorari to the Supreme Court of the State of Connecticut, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

TO REVOKE A ROOMING HOUSE USE FOR PETITIONER'S PREMISES WHICH HAD BEEN SO OPERATED FOR OVER 18 YEARS, BECAUSE LICENSE GRANTED 'ILLEGALLY', IS TO DENY PETITIONER THE EQUAL PROTECTION OF LAWS AS GUARANTEED BY THE 14th AMENDMENT.

The Petitioner's premises began housing roomers in 1941. The rooming house licensing ordinance adopted by the Town of West Hartford on May 24, 1949 was essentially designed to supervise the safe operation of the town's rooming houses. Pursuant to its provisions, the Town Building Inspector was empowered to grant a license if inter alia "...the location of said rooming house complies with the zoning regulations." § 14.3.4, Town of West Hartford ordinances. Violations leading to revocation of the license were confined to those involving conduct and maintenance of the building. Id § 14.3.7. The Petitioner's dwelling was duly licensed in 1949 based in part on a determination by the

then inspector, by law, that zoning did not prohibit its continued use as a rooming house. The license was re-issued each of the next 18 years by that office.

The Respondent contends that the initial licensed use of the Petitioner's premises as a rooming house in 1949 was illegal, and that the continued licensing for the next 18 years did not serve to remedy the illegality. That contention is based upon the Respondent's recent assumption that since the inception of zoning in West Hartford in 1924, rooming houses have never been an allowable use in Petitioner's zone. Therefore, rooming house licensing ordinances of 1949 would apply only to those premises used for roomers prior to 1924, since a legal nonconforming use would have to predate zoning. The Petitioner was informed in 1967 that failure of the house to exist as a legally existing nonconforming use, rendered the license inapplicable at its granting and 18 years henceforth. The only way, then, for the Petitioner to continue to hold a rooming house license at this point in time 18 years after its issue for the premises, was to seek a variance, which she did, and which was denied her. That litigation is the basis of the petition for certiorari.

The house dealt with here is not on one of the town's quiet side streets where roomers might have come and gone unnoticed for that lengthy period of its history. Rather, its location at a corner of two heavily trafficked resi-

dential streets, demands public attention to its imposing victorian presence. For the nature of operation of that highly visible dwelling to exist for 18 years as a 'mistake of fact' contrary to a zoning policy which the Respondent would now have we believe is basic to the welfare of the neighborhood in question and the town, is nothing short of incredible.

For the Respondent to hold that the 1949 ordinance is a nullity as to those premises, such as the Petitioner's, which are not legally existing non-conforming uses, despite their having been duly licensed for a long period of time, is to deny the Petitioner equal protection of the law. The ordinance should remain the law for Petitioner's premises by virtue of its many years use under legal license as well as for others who continue to hold a license under the act.

Even allowing that the use in 1949 was illegal for the before mentioned reasons, to which the Petitioner has steadfastly disagreed, the result which has followed is so ludicrous and unjust as to require examination of the traditional concept of municipal inmunity for acts of its employees on which the Respondent relies below.

Recognizing the general rule that, without more, the fact that city officials fail to enforce a zoning ordiance against a violator, does not estop a city from subsequently enforcing it,

58 Am Jur 1045 § 193/ALR 2d 338,

and inasmuch as we have here not merely a failure to enforce a zoning provision, but positive ministerial action based on an alleged mistake of fact which withstood a period of over 18 years of possible administrative scrutiny, traditional concepts should not dictate absurd results. This harmless 'illegality' does not demand sudden correction at this time.

Just as a municipal officer can bind his government by acts which come within the just exercise of his official powers in order to protect those acting in reliance, public policy dictates that a longstanding, although technically ill-founded, zoning policy for a neighborhood zone, should not be dispensed with against all or part of the homes within. The relative harm worked on the Petitioner, whose large victorian property is ill-suited for any other use,in light of any possible benefit to the community, heavily tilts the scales of justice.

Here we have facts which soften even the most hard rule of law. The qualifying phrases, attached to those rules in areas of zoning and municipal corporations such as, "generally",and "as a general rule", provide for the essential element of fairness in judicial resolution of the controversy at hand. As to their application to the law of estoppel and the concept of laches, it is submitted that as against the Town of West Hartford, the facts herein presented compel

just such a reading of those doctrines in order to prevent manifest injustice, and for them to so claim would be unconstitutional as it deprives her of the right to equal provision of the laws.

The consistent stand of the office of the Building Inspector from 1949 to 1967 in allowing rooming houses in Petitioner's property zone, should prevent him and the town from now examining the decision made over 18 years ago in order to revoke the Petitioner's license for illegality. The ordinance should continue to apply to the Petitioner's house as it did for that period. And just as that ordinance protects those who are, from the Respondent's view, legally licensed under it, it should similarly protect the Petitioner by preventing the arbitrary revocation of her license.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the Supreme Court of the State of Connecticut.

Bruce Mayor
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I, Bruce Mayor, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Bruce Mayor
Counsel for Petitioner